UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MURRAY AMERICAN ENERGY, INC., AND THE MONONGALIA COUNTY COAL COMPANY, A SINGLE EMPLOYER,

and Case No. 06-CA-254520

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, LOCAL 1702, AFL-CIO, CLC

BRIEF OF THE RESPONDENTS

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Respondents Murray American Energy, Inc. ("Respondent MAEI") and The Monongalia County Coal Company ("Respondent Monongalia")(Respondent MAEI and Respondent Monongalia referred to collectively as the "Respondents") hereby submit this Brief to the Administrative Law Judge in the above-referenced matter.

I. INTRODUCTION

Judgment should be entered in favor of the Respondents because they did not violate the National Labor Relations Act (the "Act") as a matter of law. Since at least 2017, Respondent Monongalia has maintained an Access to Employee Personnel File Policy (the "Personnel File Policy), providing a reasonable and appropriate method by which its human resources department may ensure the orderly review and copying of the sensitive information contained in the hundreds of employee personnel files it maintains. The Personnel File Policy ensures Respondent Monongalia's compliance with Pennsylvania law. It was enacted consistent with Respondent Monongalia's rights under the National Bituminous Coal Wage Agreement of 2016 (the "NBCWA") and without protest from the United Mine Workers of America, District 31, Local 1702, AFL-CIO, CLC (the "Union"). The Personnel File Policy is facially neutral and imposes no actual or perceived burden on Section 7 rights.

The Personnel File Policy remained in place for years without incident, until the Union decided to create a federal case over it. It did so by requesting the personnel file of an employee, Jeff Reel, then refusing the Respondents' repeated entreaties to simply comply with the Personnel File Policy by performing the ministerial act of completing a form and agreeing to pay the nominal costs of copying the requested portions of the file.

Instead, the Union proceeded with filing the Unfair Labor Practice Charge (the "ULP Charge") in the above-referenced matter, alleging violations of Sections 8(a)(1) and 8(a)(5). The Union's allegations lack credibility, given that it said nothing when the Policy was enacted and claimed no prejudice in the ensuing years while it fulfilled its representative responsibilities to its members. Further, and incredibly, the individual whose file is sought in this case, Mr. Reel, who has been a Union official at all relevant times, previously complied with the Policy without complaint, paid a nominal fee for the copying of the file, and received it, all without claiming an infringement on his Section 7 rights.

Given these facts, it is evident that the ULP Charge is without merit and that the General Counsel will not meet its burden to prove that the Respondents violated the Act. This is so because the Personnel File Policy is facially neutral and does not interfere with any Section 7 rights and because the Respondents lawfully implemented the Policy pursuant to the terms of the NBCWA. If the Union disagreed with the Policy when implemented back in 2017, it had the option to file a grievance, but elected not to do so. It should not now be able to use a ULP Charge as a vehicle for addressing its past acquiescence.

II. SUMMARY OF MATERIAL FACTS

The materials facts set forth herein are based upon the parties' Joint Stipulations and the Joint Exhibits submitted therewith.[1]

A. The Respondents' Operations

Respondent Monongalia operates a coal mine, named the Monongalia County Mine, which traverses the Pennsylvania-West Virginia border and maintains a mine portal located in Kuhntown, Pennsylvania. J.S., ¶ 5. Respondent MAEI is the parent company of Respondent Monongalia. J.S., ¶ 4.

The hourly production and maintenance employees of Respondent Monongalia are represented for purposes of collective bargaining by the Union. J.S., ¶¶ 21(a-e). The Union and the Respondents are parties to a collective bargaining agreement, the NBCWA, which is effective from August 15, 2016 to December 31, 2021, and which governs the terms and conditions of the hourly production and maintenance employees at the Monongalia County Mine. J.S., ¶¶ 16, 21(a-e).

B. Respondent Monongalia's Long Standing Personnel File Policy

Since at least 2017, Respondent Monongalia has maintained the Personnel File Policy. J.S., ¶¶ 32; J.E. 12-14. The Personnel File Policy is facially neutral, consistent with Pennsylvania law, *see* 43 P.S. § 1321, *et seq*., and provides that, *"[e]mployees, or their authorized representatives*, may request access to their basic personnel file." J.E. 12 (emphasis added).

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[1] "J.S., ¶ ___ " is used to refer to the parties' Joint Stipulations, filed on June 29, 2020, and "J.E. __" refers to the Joint Exhibits attached to the Joint Stipulations.

Under the Personnel File Policy, "[a]ll requests for access to an employee's personnel file must be providing in writing to the human resources department on the Company's 'Request to View/Copy Personnel File' form." J.E. 12. Moreover, the Personnel File Policy permits employees to obtain copies of documents contained in personnel file, but notes that the "Company may charge the employee the actual cost of copying." J.E. 12.

The "Request to View/Copy Personnel File" Form is a two-page document and includes, among other things, provisions for requesting an appointment to review a personnel file and/or copying of all or parts of the file. J.E. 12. The Form also includes an affirmation, stating that the employee completing the Form understands that, "I may be charged the actual cost of copying any copies from my personnel file I request." J.E. 12.

C. Reel's Prior Compliance with Monongalia's Personnel File Policy

Prior to October 3, 2019, and since the implementation of the Personnel File Policy, Monongalia County has received only one other request for access to a personnel file. J.S., ¶ 33; J.E. 13-14. The only individual to request access to his personnel file was Jeff Reel, who is the subject of the request for a copy of the personnel file in this case, and who has at all relevant times been a Union official. J.S., ¶¶ 15, 33; J.E. 13-14.

Reel made a request for access to his personnel file on October 23, 2017, and complied with the Personnel File Policy. J.S. ¶¶ 33-34; J.E. 13-14. The request was compliant with the Personnel File Policy in that Reel completed and signed the "Request to View/Copy Personnel File" Form and requested a time to review the file. J.S. ¶¶ 33-34; J.E. 13-14. Mr. Reel also requested a copy of his entire file. J.E. 13.

Respondent Monongalia provided Mr. Reel with a copy of his personnel file as requested and consistent with the terms of the Personnel File Policy. J.S. ¶¶ 35-36; J.E. 13-14. Reel was charged a nominal fee of $7.20 for the cost of copying the file and he paid that fee without

dispute. J.S. ¶¶ 35-36; J.E. 13-14. A review of the "Request to View/Copy Personnel File" Forms submitted by Mr. Reel reveal a process working exactly as intended with the parties meeting to review a file, discussing its contents, and a copy being provided to Mr. Reel upon request. J.E. 13-14.

D. The Union's Acquiescence to Monongalia's Personnel File Policy

The parties' course of dealing over the past three years reveals not only that the Union acquiesced to the Policy, but also that it has not been an impediment to the adjustment of grievances or to the Union's ability to perform its representational role. No other requests for personnel files access have been received and there have been no other objections to the Personnel File Policy except for the ULP Charge in this case. J.S. ¶¶ 33-36; J.E. 12-14.

This is so despite the fact that Respondent Monongalia maintains disciplinary records in Union members' personnel files. J.S. ¶¶ 39. There have been no prior disputes because the terms of the NBCWA impose a mutual obligation on the parties to exchange information. J.S. ¶¶ 37-38.

Article XXIII, Section (e), of the NBCWA states, "At all steps of the complaint and grievance procedure, the grievant and the Union representatives shall disclose to the company representatives a full statement of the facts and the provisions of the Agreement relied upon by them. In the same manner, the company representatives shall disclose all the facts relied upon by the company." J.S. ¶¶ 37-38; J.E. 2, pp. 270-71. The section of the NBCWA in which these obligations are detailed is entitled "Earnest Effort to Resolve Disputes" and imposes a duty on the parties: "[a]n earnest effort shall be made to settle differences at the earliest practicable time." J.E., 2, p. 270. It is undisputed that, pursuant to that provision, Respondent Monongalia as a matter of course has provided to the Union any disciplinary records located in the personnel

files of bargaining-unit employees upon which it intends to rely in connection with a grievance. J.S. ¶ 38.

E. The Union's Repeated Refusal to Comply with the Personnel File Policy

On October 4, 2019, the Union submitted via email a request for a copy of Reel's personnel file. J.S. ¶ 22; J.E. 4. The Respondents responded within minutes and requested information regarding the relevance of the request. J.S. ¶ 22; J.E. 4. The Union responded by stating that the request was made "at the request of Jeff Reel and the UMWA" and the purpose of the request was to "verify the contents of [Reel's] record and to "establish what is in his file at this specific time for any past, pending or future litigation where this information is pertinent." J.E. 4. The Respondents responded later that same day to the Union via email, stating in part, "Please have Mr. Reel follow the Company's policy regarding requests to review personnel files. The Mine's Human Resources office can provide details." J.S. ¶ 23; J.E. 5.

The Union again responded the same day, October 4, 2019, via email, "requesting the company policy regarding requests to review personnel files" and stating, before it had ever received the Personnel File Policy, that "failure to [produce the personnel file] may again result in the Union being forced to file a Board Charge." J.S. ¶ 24; J.E. 6. The Respondents emailed the Union again on October 4 and provided a copy of the Personnel File Policy and the Request to View/Copy Personnel File Form to the Union. J.S. ¶ 25; J.E. 7. The Respondents instructed the Union to have Mr. Reel complete the Form and submit it to the human resources department, consistent with Respondent Monongalia's Policy. J.E. 7. On October 10, 2019, the Union responded by refusing to complete the Request to View/Copy Personnel File Form. J.S. ¶ 26; J.E. 8. Instead, the Union submitted a letter from Mr. Reel, stating in part, "I am not interested in signing for a copy of my record, nor being charged for a copy of my record." J.E. 8.

The issue sat dormant for the next approximately 3 months, until Union filed the ULP Charge in this case on January 13, 2020. J.S. ¶ 1; J.E. 1(a). Then, on March 4, 2020, the Union sent correspondence to the Respondents dated March 4, 2020. J.S. ¶ 28; J.E. 10.[2] Once again, the Union refused to comply with the Personnel File Policy. J.E. 10. Indeed, the Union's communication includes a Request to View/Copy Personnel File Form that was not completed by the employee at issue (Mr. Reel) and includes the same letter from Mr. Reel previously submitted in which he refuses to pay for a copy of the parts of the personnel file requested. J.E. 10. In response, the Respondent sent a letter to the Union that same day, informing the Union that, consistent with the Personnel File Policy, Mr. Reel is required to complete the Request to View/Copy Personnel File Form and to pay for the cost of copying. J.E. 11.

The Union never responded to the Respondent's letter dated March 4, 2020. J.S. ¶¶ 30-31. Indeed, there have been no further communications between the Parties concerning the request for Mr. Reel's personnel file. J.S. ¶¶ 30-31.

III. ARGUMENT

The ULP Charge should be dismissed because the Respondents did not violate Section 8(a)(1) or Section 8(a)(5) of the Act. The Respondents did not violate Section 8(a)(1) because they maintain a facially neutral and lawful Personnel File Policy, which has been in effect for at least three years. The Policy creates a rational and reasonable method for access to employee personnel files and would not be interpreted by a reasonable employee as interfering with Section 7 rights. Moreover, the Respondent did not violate Section 8(a)(5) because it enacted

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[2] Joint Stipulation 28 incorrectly refers to the Union's communication as Joint Exhibit 11, but it evident that the Union's communication of March 4, 2020 is Joint Exhibit 10. Joint Exhibit 11 is the Respondents' response to the Union's communication found at Joint Stipulation 28 (not Joint Stipulation 27) and is also dated March 4, 2020.

and enforced its Policy consistent with the terms of the NBCWA. The Union acquiesced to the enactment of the Policy and should not be permitted to sidestep the contractual grievance process to seek relief in the form of a ULP Charge.

A. The Personnel File Policy does not Violate Section 8(a)(1)

The Personnel File Policy does not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights under the Act. To the contrary, the Personnel File Policy is facially neutral and has no impact on protected rights. It is, therefore, lawful and the Respondents have not violated Section 8(a)(1).

i. The Personnel File Policy does not impact Section 7 rights.

Since at least 2017, Respondent Monongalia has maintained a Personnel File Policy. J.S., ¶¶ 32; J.E. 12-14. The Policy is neutral on its face and imposes no negative consequences to individuals who exercise Section 7 rights. J.E. 12. Indeed, the Policy states, "[e]mployees, or their authorized representatives, may request access to their basic personnel file." J.E. 12. The Policy contains minimal requirements, obligating individuals only to submit the Request to View/Copy Personnel File Form and to pay the charges for copying the file. J.E. 12.

Due to the National Labor Relations Board's (the "Board") decision in *Boeing Company*, 365 NLRB No. 154 (2017), facially neutral work rules, such as the Personnel File Policy, are analyzed under a balancing test by which the considerations are the: "(1) nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s)." 365 NLRB No. 154, slip op. at 3 (emphasis in original). In discussing the applicable analytical framework, the Board described particular categories of work rules under the test, including: Category 1 (rules that are lawful because they do not prohibit or interfere with Section 7 rights or the justifications outweigh such an interference); Category 2 (rules that

require a close analysis of the balance between the interests); and Category 3 (rules that are invalid). *Id.*, at slip op. at 3-4; *see also Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132 (2020).

More recently, the Board provided further guidance regarding the contours of the analysis for work rules. *See LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). The burden rests with the General Counsel to prove that a facially neutral work rule would be interpreted by a reasonable employee as interfering with Section 7 rights. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2-3; see also *Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132. If the General Counsel fails to meet that burden, then the inquiry ends and the policy is lawful. *Id.* If the General Counsel meets its obligation, then consideration must be given to the balance between the potential interference with Section 7 rights and the justification for the rule. *Id*.

In this case, the General Counsel cannot meet its initial burden of proving that the Personnel File Policy would reasonably be interpreted as interfering with Section 7 rights. This is so because the Policy imposes no limitations or interference with Section 7 rights on its face. Its only requirements are ministerial in nature, *i.e.*, the submission of a form and the payment of a nominal fee. J.E. 12. The Policy does not bar access or otherwise limit access and, in fact, expressly provides the opposite for both employees and their authorized representatives. J.E. 12. In fact, the Policy states that, upon receipt of the Request to View/Copy Personnel File Form, the company "will" schedule an appointment to provide access.[3] Finally, costs are incurred by an employee only to the extent that they request a copy of the file and the costs are nominal and

[3] As such, cases involving the refusal to provide personnel file information to a union on the basis of confidentiality or similar concerns are simply irrelevant in this context. Indeed, the Respondents have not refused to provide the personnel file to the Union in this case; they've only sought to vindicate their Policy in this regard.

represent only the actual costs of copying. J.E. 12. The Policy imposes no actual or perceived burden on Section 7 rights and is the equivalent of having to complete a sign-in sheet or providing identification when visiting an office.

Perhaps the best evidence of the lack of limitations or interference with Section 7 rights is the parties' course of dealing. Although the Policy has been in place since 2017, there is no evidence of any dispute between the parties regarding the Policy or any challenge to it. J.S., ¶¶ 32; J.E. 12-14.

In addition, it is evident that reasonable employees have not and do not interpret the Policy as interfering with Section 7 rights. In fact, the individual who is the subject of the personnel file request in this case, Jeff Reel, who at all relevant times has been a union official, previously made a request for access to his personnel file on October 23, 2017, fully complied with the Personnel File Policy, and received a copy of his personnel file. J.S. ¶¶ 15, 33-34; J.E. 13-14. Moreover, Mr. Reel agreed to pay the nominal fee of $7.20 for the cost of copying the file and he paid that fee without dispute. J.S. ¶¶ 35-36; J.E. 13-14.

Finally, it is clear that, over the past three years, the Personnel File Policy has not been an impediment to the adjustment of grievances or to the Union's ability to perform its role as collective bargaining representative. While Respondent Monongalia maintains disciplinary records in Union members' personnel files, there have been no prior disputes because the terms of the NBCWA impose a mutual obligation to exchange information. J.S. ¶ 38.

ii. The Respondents' justifications outweigh any purported impact on Section 7 rights.

Even if the General Counsel could meet its burden of proving that the Personnel File Policy interferes with Section 7 rights, the Respondents' legitimate reasons for implementing the Personnel File Policy plainly outweigh any purported interference. As an initial matter,

Respondent Monongalia is located in part in Pennsylvania, *see* J.S., ¶ 5, and its enactment of the Personnel File Statute ensures compliance with the Pennsylvania Inspection of Employment Records Law. *Compare* 43 P.S. § 1322 *with* J.E. 12.

Moreover, it goes without saying that employee personnel files are sensitive documents, containing employees' personal information. Respondent Monongalia employs hundreds of employees, *see* J.S. ¶ 21(a), and it is plainly in its legitimate business interests to provide a mechanism for the orderly access, review, and copying of such sensitive information. J.E. 12. The Respondents' interests in this regard plainly outweigh any modest interference with access to such information.

B. The Enactment of the Personnel File Policy did not Violate Section 8(a)(5)

The Respondents did not violate Section 8(a)(5) of the Act because they sought to vindicate a reasonable work rule enacted pursuant to their rights under the NBCWA. Indeed, the Respondents did not refuse to provide the information sought by the Union, but only requested that the Union comply with the Personnel File Policy as it has done in the past. The Respondents' actions are not a refusal to bargain with the Union.

In *National League of Professional Baseball Clubs*, 330 NLRB 670 (2000) the Board observed that, "it seems unlikely that the Board would find an 8(a)(5) unilateral change in these circumstances where an employer's action was consistent with a reasonable interpretation of the collective-bargaining agreement." As the Board held in *Vickers, Inc*., when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct. 153 NLRB 561, 570 (1965).

Here, under the terms of the NBCWA, the Respondents have the inherent right to adopt reasonable work rules, which they did in implementing the Personnel File Policy. J.S., ¶¶ 32; J.E. 12-14. The Respondents and the Union are signatories to the NBCWA, *see* J.S., ¶¶ 16, 21(a-e), which contains a broad management rights clause at Article IA, Section (d):

> The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

J.E. 2, p. 5.

The NBCWA also contains at Article I – Enabling Clause, the following pertinent provision:

> This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood.

J.E. 2, pp. 2-3. Both of the provisions of the NBCWA set forth above appear verbatim back to the National Bituminous Coal Wage Agreement of 1978, which expired on March 27, 1981. *See* J.E. 3.

The NBCWA also contains, at Article XXIII, Section (k), the following:

> All decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous Coal Wage Agreement of 1978 shall continue to have precedential effect under this Agreement to the extent that the basis for such decisions have not been modified by subsequent changes in this Agreement.

J.E. 2, p. 272. That provision first appeared in the National Bituminous Coal Wage Agreement of 1981, *see* J.E. 3, and remains in the NBCWA, leaving prior decisions of the Arbitration Review Board ("ARB") binding on the parties. *See* J.E. 2-3.

Further, the ARB issued Decision 78-25 on March 5, 1980, within the term of the 1978 NBCWA, holding that signatory employers are entitled to unilaterally enact "reasonable" rules.

See J.E. 3, ARB Decision 78-25, pp. 21-23. Since that ruling, the parties have not modified Article IA(d) or the related language found in Article I – Enabling Clause as reflected in the terms of the NBCWA. *See* J.E. 2-3.

The principle that management has the right to enact reasonable work rules under the NBCWA has been consistently recognized by arbitrators in the years following ARB Decision 78-25. *See* J.E. 3, *Local Union 2283, District 2, UMWA and Keystone Coal Mining Corporation*, Arbitration Case No. 93-02-97-44 (January 5, 1998)(upholding an employer's unilaterally implemented vacation policy); *Oak Grove Resources, LLC and Local 2133, District 20, UMWA*, Arbitration Case No. 11-20-12-001 (October 1, 2012)(upholding management's unilateral adoption of a chronic and excessive absenteeism policy).

This background is particularly instructive when considering that Respondent Monongalia has had the Personnel File Policy in place since at least 2017 and the Union acquiesced to the implementation of the Policy. In fact, and as noted, prior to October 3, 2019, Respondent Monongalia has received only one other request for access to a personnel file. J.S. ¶¶ 33-36; J.E. 13-14.

Finally, over the prior three years, there here have been no prior disputes regarding personnel files as the Respondents have as a matter of course provided to the Union any disciplinary records located in the personnel files of bargaining-unit employees for grievance purposes. J.S. ¶¶ 37-38. In conclusion, therefore, the Personnel File Policy was properly implemented and the Respondents' invocation of this reasonable Policy in this case is not a refusal to bargain as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Administrative Law Judge enter a finding that the Respondents did not violate the Act.

Respectfully submitted,

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Dated: August 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of the Respondents in the above-captioned matter was filed electronically with the National Labor Relations Board, and was served via e-mail on the following addresses indicated this 13th day of August, 2020:

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